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21

22 **UNITED STATES DISTRICT COURT**
23 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**
24

25 CORY SPENCER, an individual;
26 DIANA MILENA REED, an
individual; and COASTAL
27 PROTECTION RANGERS, INC., a
28 California non-profit public benefit

CASE NO. 2:16-cv-02129-SJO (RAOx)

**PLAINTIFFS' REPLY TO
DEFENDANT BLAKEMAN'S
OPPOSITION TO PLAINTIFFS' EX
PARTE APPLICATION**

1 corporation,

2 Plaintiffs,

3 v.

4 LUNADA BAY BOYS; THE
5 INDIVIDUAL MEMBERS OF THE
6 LUNADA BAY BOYS, including but
7 not limited to SANG LEE, BRANT
8 BLAKEMAN, ALAN JOHNSTON
9 AKA JALIAN JOHNSTON,
10 MICHAEL RAE PAPAYANS,
11 ANGELO FERRARA, FRANK
12 FERRARA, CHARLIE FERRARA,
13 and N. F.; CITY OF PALOS VERDES
ESTATES; CHIEF OF POLICE JEFF
KEPLEY, in his representative
capacity; and DOES 1-10,

14 Defendants.

Complaint Filed: March 29, 2016
Trial Date: December 12, 2017

1 **I. INTRODUCTION**

2 Blakeman attempts to lessen the severity of his misdeeds by claiming
 3 Plaintiffs did not request the destroyed evidence and that there is no prejudice
 4 because Plaintiffs acquired some of the missing information from a co-Defendant,
 5 albeit after the close of discovery and after Defendants filed their summary
 6 judgment motions. But Plaintiffs indisputably served discovery requests in
 7 September 2016 to which Blakeman lied in response and then withheld critical
 8 evidence. Plaintiffs incurred substantial expense opposing Blakeman's ill-
 9 conceived summary-judgment motion, and will continue to suffer prejudice at trial.

10 Having failed to articulate a viable basis for his opposition, Plaintiffs' ex parte
 11 request should be granted and their motion should be heard on its merits. Moreover,
 12 in light of this Court's recent order moving the trial date, sufficient time exists to
 13 have this motion heard well in advance of trial.

14 **II. ARGUMENT**

15 **A. Plaintiffs' Request For Ex Parte Relief Should Be Granted.**

16 Plaintiffs sought ex parte relief to address Defendants Blakeman and the
 17 City's spoliation of evidence, which was only discovered on October 2, 2017
 18 following Defendant Papayans' late production of evidence. (Decl. Wolff Supp.
 19 Pltfs.' Mot. for Sanctions, Dock. No. 508-41 at ¶ 21.) That same day, Plaintiffs'
 20 counsel initiated the meet-and-confer process. (*Id.* at ¶ 22.) Defense counsel
 21 prolonged the meet-and-confer process – and Plaintiffs' inevitable filing – by
 22 demanding an unnecessary level of detail with respect to the basis for Plaintiffs'
 23 motion. (*See id.* at ¶¶ 26-37.) Plaintiffs obliged, and in doing so, were forced to file
 24 their motion close-in-time to the parties' pretrial conference. With the Court's
 25 recent order moving the trial date to February 2018, sufficient time now exists to
 26 have Plaintiffs' motion heard well in advance of trial. In short, Plaintiffs brought
 27 the issue of Blakeman's and the City's spoliation to the Court's attention at the
 28 earliest opportunity. Blakeman and the City will not suffer any prejudice by having

1 the matter heard, nor has Blakeman articulated any. By comparison, Plaintiffs will
 2 suffer severe prejudice if these Defendants are permitted to destroy evidence
 3 without consequence.

4 **B. Blakeman Caused Plaintiffs Harm By Destroying Incriminating**
 5 **Evidence And Lying About Its Existence.**

6 While completely ignoring the discovery requests that Plaintiffs propounded
 7 at the outset of discovery to both the City and Blakeman, Blakeman claims that
 8 Plaintiffs are responsible for being in a “precarious position” and needing ex parte
 9 relief from the Court. (Opp’n at 3:8-8.) In essence, Blakeman argues that Plaintiffs
 10 somehow are to blame for Blakeman’s unethical discovery gaffes. This argument
 11 misses the mark for several reasons.

12 First, throughout the course of discovery, Plaintiffs specifically requested
 13 Blakeman’s communications – including text messages – related to the allegations
 14 in this lawsuit. (Decl. Wolff Supp. Pltfs.’ Mot. for Sanctions, Dock. No. 508-8, Ex.
 15 3 at p. 2 (defining “document” to include text messages and telephone calls) and
 16 Req. Nos. 1 (seeking documents related to any Plaintiff), 9 (seeking documents
 17 relating to efforts to keep people from surfing Lunada Bay), 10 (seeking texts
 18 amongst anyone who surfs or has surfed Lunada Bay referring or related to Lunada
 19 Bay).) Blakeman’s argument that “Plaintiffs never asked to examine Blakeman’s
 20 phone and [] never requested an extraction report” is immaterial given Plaintiffs’
 21 targeted requests for his relevant communications. (Opp’n at 2:23-3:1.) Any
 22 request for an inspection of Blakeman’s cell phone and an extraction report would
 23 have been unnecessary, redundant, and arguably overbroad.

24 Second, there is no amount of blame-shifting that can excuse Blakeman’s
 25 failure to provide truthful discovery responses. Plaintiffs specifically requested
 26 Blakeman’s text messages with other local surfers related to their efforts to prevent
 27 others from surfing at Lunada Bay. Blakeman denied possessing any responsive
 28 communications and, during his deposition, denied using his phone to text anyone

1 other than his wife. (Decl. Wolff Supp. Pltfs.' Req. for Sanctions, Dock. No. 508-8,
 2 at Ex. 4 at pp. 4-5.) Given these responses, there would have been no basis for
 3 Plaintiffs to compel the production of evidence which Blakeman attested under oath
 4 did not exist. Moreover, Plaintiffs had no knowledge of the texts he exchanged with
 5 co-Defendant Papayans until they were produced by Papayans on October 2, 2017 –
 6 nearly two months after the close of discovery.

7 Finally, Blakeman's claim that he had no obligation to "immediately clon[e]
 8 the phone and obtain[] an extraction report *sua sponte*," further underscores his
 9 misunderstanding of his obligations under the Federal Rules. Blakeman's duty to
 10 preserve relevant evidence arose at the outset of this litigation and existed
 11 irrespective of any request by Plaintiffs (though Plaintiffs did send Blakeman's
 12 counsel a document preservation letter before discovery commenced, and later
 13 followed up with specific document requests seeking this information). *Consumer*
 14 *Financial Protection Bureau v. Morgan Drexen, Inc.*, 101 F. Supp. 3d 856, 872
 15 (C.D. Cal. April 21, 2015) (the duty to preserve "attaches when a party should have
 16 known that the evidence may be relevant to future litigation" or when litigation is
 17 "reasonably foreseeable"). Had Blakeman attempted to preserve relevant evidence
 18 at the outset of this litigation, it is likely the missing evidence would have been
 19 recovered. (Decl. Kellermann, Dock. No. 468-2 at ¶ 8.)

20 Even setting aside his initial preservation duty, Blakeman was obligated to
 21 provide this information in response to Plaintiffs' discovery requests. Fed. R. Civ.
 22 P. 34(a)(1). But instead, he chose to lie in response to written requests and at his
 23 deposition, twice denying the existence of relevant (and incriminating) evidence.
 24 Blakeman's flouting of the Federal Rules only highlights the need for intervention.

25 **C. Plaintiffs Have Been – And Will Continue To Be – Prejudiced By**
 26 **Blakeman's Spoliation.**

27 Blakeman apparently believes he should not have to suffer any repercussions
 28 for destroying relevant evidence because one of his co-defendants produced *some* of

1 the texts he destroyed. But this argument ignores the enormous ethical lapse of
2 destroying critical evidence, and then arguing for summary judgment on the basis
3 that “[t]here is simply no evidence linking Blakeman’s conduct relating to Spencer
4 or Reed to a conspiracy, or others defendants’ alleged conduct to Blakeman.”
5 (Blakeman MSJ, Dock. No. 284, at 6:2-23.) Notwithstanding Blakeman’s duty of
6 candor to the Court, no mention was made of his destruction of the very evidence he
7 claimed did not exist. *See* Reporter’s Tr. of Oct. 12, 2017 Hearing, Dock. No. 515
8 at 40:7-13, attached as Ex. 1 to the Decl. of Samantha Wolff. Plaintiffs incurred
9 substantial expense opposing a motion that never should have been filed in the first
10 instance, given his destruction of incriminating evidence.

11 Further, four texts that Blakeman exchanged with Defendant Lee have not
12 been recovered or produced by either party. As Magistrate Judge Oliver recently
13 stated with respect to this missing evidence, “[t]he Court finds that Plaintiffs have
14 already been prejudiced in having to oppose motions for summary judgment without
15 this potentially relevant evidence . . . [and] will be prejudiced at trial by not being
16 able to present or rely on the contents of these text messages.” (Report and
17 Recommendation of United States Magistrate Judge on Motion for Sanctions
18 Against Charlie Ferrara, Frank Ferrara, and Sang Lee, Dock. No. 496 at 28:14-17.)
19 This Court has already found prejudice stemming from the Defendants’ destruction
20 of evidence – the question remains how to remedy their prejudice.

21 Finally, Blakeman himself demonstrates additional prejudice that Plaintiffs
22 will suffer. He argues the incriminating messages recently produced by co-
23 defendant Papayans “cannot be authenticated” and therefore “plaintiffs cannot show
24 any admissible evidence of text messages.” (Opp’n at 5:10-11, 4:19, 5 at fn. 9.)
25 Not only should Blakeman be precluded from challenging the authenticity of the
26 very documents he sought to destroy, but his summary-judgment motion should be
27 denied and the jury should be instructed that the additional (and unrecovered) texts
28 Blakeman exchanged with Sang Lee were likely to contain evidence that was

1 unfavorable to Blakeman.

2 **III. CONCLUSION**

3 Notwithstanding his destruction of evidence and untruthful discovery
 4 responses, Defendant Blakeman argues Plaintiffs should nevertheless be denied the
 5 opportunity to seek relief for the prejudice caused by his spoliation of evidence. But
 6 Blakeman ignores the prejudice Plaintiffs suffered in having to respond to his
 7 inappropriate summary-judgment motion, and will continue to suffer at trial, where
 8 he apparently intends to question the authenticity of the very evidence he sought to
 9 destroy. Blakeman also ignores that additional evidence – the four text messages he
 10 exchanged with Defendant Lee – remain missing. Blakeman has failed to articulate
 11 any basis for the denial of Plaintiffs’ request, and Plaintiffs therefore request that
 12 this Court grant Plaintiffs’ ex parte request and hear their motion on its merits.

13
 14 DATED: November 7, 2017

HANSON BRIDGETT LLP

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 16
 17 By: /s/ Samantha Wolff

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